UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MDG INTERNATIONAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:07-cv-1096-SEB-TAB
	)	
AUSTRALIAN GOLD, INC.,	)	
	)	
Defendant	)	
	)	

DEFENDANT AUSTRALIAN GOLD'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS CONSTRUCTIVE FRAUD CLAIM

Among other claims, MDG International, Inc. ("MDG") has filed suit against Australian Gold, Inc. ("Australian Gold") for constructive fraud. To maintain a claim for constructive fraud under Indiana law, MDG must allege that Australian Gold owed it a duty arising out of a fiduciary or other special relationship between the parties. MDG has failed to make any allegation that MDG and Australian Gold had a special relationship giving rise to a duty. Consequently, the Court should dismiss MDG's constructive fraud count for failure to comply with the requirement of Federal Rule of Civil Procedure 9(b) that fraud claims be stated with particularity.

I. MDG's relevant allegations.

With respect to the basis of the relationship between MDG and Australian Gold, MDG has alleged that:

> 7. On May 27, 1994, MDG and ETS, the corporate predecessor to Australian Gold, executed a Distributorship Agreement ("Agreement").
>
> 8. On November 1, 1997, ETS assigned its rights under the Agreement to Australian Gold.

Dockets.Justia.com

* * * * * *

> 12. Pursuant to the Agreement, MDG has the exclusive right to market, distribute, and sell Australian Gold tanning products in territories as defined from time to time. . . .

With respect to MDG's Count II for constructive fraud, MDG's sole allegation concerning the nature of the relationship between the parties and the duty allegedly arising from that relationship is that:

> 97. Australian Gold, as manufacturer, owes a duty to MDG, its distributor.

II. Failure to allege special relationship is fatal to constructive fraud claim.

Under Indiana law, "[t]he elements of constructive fraud are *a duty existing by virtue of the relationship between the parties*, representations or omissions made in violation of that duty, and a reliance on the representation or omission by the individuals to whom the duty is owed to the detriment of those individuals." *Comfax Corp. v. N. Am. Van Lines, Inc.*, 587 N.E.2d 118, 125 (Ind. Ct. App. 1992) (emphasis added). This "special" relationship arises when the parties have fiduciary duties to each other. *Id.* at 125. However, fiduciary obligations do not arise under Indiana law from arm's length contractual relationships. *See Olcott Int'l & Co., Inc. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063, 1073 (Ind. Ct. App. 2003) (finding that no fiduciary relationship arose from software licensing agreement).

Federal Rule of Civil Procedure 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, a plaintiff alleging constructive fraud that fails to allege the special relationship giving rise to a duty has failed to state its claim with the required particularity. *See Concordia Theological Seminary, Inc. v. Hendry*, 2005 WL 3005482, *3 (N.D. Ind. Nov. 9, 2005) (dismissing constructive fraud claim for failure to plead a relationship giving rise to a duty); *F. McConnell & Sons, Inc. v. Target Data Sys., Inc.*, 84 F. Supp. 2d 980, 986 n.6 (N.D. Ind. 2000) (dismissing constructive fraud claim on other grounds and noting that constructive fraud claim could have been dismissed under Rule 9(b) for failure to plead a special relationship).

MDG brings a claim for constructive fraud in Count II of its Complaint; however, MDG's only allegation with regard to the relationship between MDG and Australian Gold was that "Australian Gold, as manufacturer, owes a duty to MDG, its distributor." (MDG Complaint at ¶ 97.) This bare allegation of a contractual relationship between MDG and Australian Gold is not sufficient to state a claim for constructive fraud. Because a relationship based on an arm's length contract does not give rise to a fiduciary relationship (absent some other special circumstance), there is simply no allegation of the "special relationship" required to make a claim for constructive fraud. *See Comfax*, 587 N.E.2d at 125-26; *Olcott*, 793 N.E.2d at 1073. Therefore, MDG has failed to plead the elements of constructive fraud with sufficient particularity, and the Court should dismiss Count II of MDG's Complaint.

III. Conclusion.

MDG failed to allege with particularity the nature of the relationship between MDG and Australian Gold that gave rise to a duty sufficient to maintain its claim for constructive fraud. Accordingly, MDG has failed to comply with the requirements of Federal Rule of Civil Procedure 9(b) and the Court should dismiss Count II of MDG's Complaint.

Respectfully submitted,

/ s / Thomas F. O'Gara

Richard A. Kempf, No. 11597-49
Thomas F. O'Gara, No. 19678-49
Peter J. Prettyman, No. 25057-49

Attorneys for Defendant Australian Gold, Inc.
SOMMER BARNARD PC
One Indiana Square, Suite 3500
Indianapolis, IN 46204
317-713-3500
317-713-3699 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Edward O. DeLaney
DELANEY & DELANEY LLC
ed@delaneylaw.net

Elizabeth A. Schuerman
DELANEY & DELANEY LLC
lizzie@delaneylaw.net

Kathleen A. DeLaney
DELANEY & DELANEY LLC
kathleen@delaneylaw.net

/ s / Thomas F. O'Gara

672015